PUBLIC PROSECUTOR v. LEE CHWEE KIOK

[O.Cr.J. (Harun J.) September 19, 1977]

[Kuala Lumpur — Selangor Criminal Trial No. 2 of 1977]

Criminal Law and Procedure — Dangerous Drugs — Trafficking — Charge amended — No consent of Public Prosecutor on the amended charge — Whether trial was a nullity — Dangerous Drugs Ordinance, 1952, ss. 37(b) & (g), 39B(1)(a), 39B(1)(c), 39(B)(3) — Criminal Procedure Code (F.M.S. Cap. 6), s. 214(i).

Dangerous Drugs — Trafficking — Amended charge — Acquittal — Dangerous Drugs Ordinance, 1952, ss. 37(b) & (g), 39B(1)(a), 39B(1)(c), 39(B)(3) — Criminal Procedure Code (F.M.S., Cap. 6), s. 214(i).

The accused was originally charged with trafficking in dangerous drugs on July 21, 1976 at TBG 1306 Jalan Harper, Kelang under section 39B(1)(a) of the Dangerous Drugs Ordinance. On November 25, 1976 the Public Prosecutor issued his written consent to prosecute under section 39B(3) of the said Ordinance. At the trial, on September 19, 1977, the learned Deputy Public Prosecutor amended the charge in two respects: The offence was alleged to have been committed at TBG 1306A, Jalan Harper, Kelang and the offence alleged was that of doing an act preparatory to trafficking under section 39B(1)(c) of the Dangerous Drugs Ordinance. No consent of the Public Prosecutor had been obtained on the amended charge.

Held, acquitting and discharging the accused: (1) the trial was a nullity as the Public Prosecutor had not given his consent on the amended charge;

(2) the facts as found in this case did not support either charge.

Cases referred to:-

(1) *Abdul Hamid* v. *Public Prosecutor* [1956] M.L.J. 231.

(2) *Lim Seo* v. *R.* [1962] M.L.J. 304.

(3) *Lyn Hong Yap* v. *Public Prosecutor* [1956] M.L.J. 226.

CRIMINAL TRIAL.

Gulamoydeen bin Mohamed Haniffa (Deputy Public Prosecutor) for the Public Prosecutor.

Radzi bin Tan Sri Sheikh Ahmad for the accused.

Cur. Adv. Vult.

Harun J.: In this case the accused was charged under section 39B of the Dangerous Drugs Ordinance. At the close of the case for the prosecution, I heard the submissions of both counsel and then directed the jury to return a verdict of not guilty under section 214(i) of the Criminal Procedure Code. They did so, whereupon I acquitted and discharged the accused. My reasons for taking this course are as follows:

The accused was originally charged with trafficking in dangerous drugs on July 21, 1976 at TBG 1306, Jalan Harper, Kelang under section 39B(1)(a) of the Dangerous Drugs Ordinance. On November 25, 1976 the Public Prosecutor issued his written consent to prosecute under section 39B(3) of the said Ordinance. She was first produced before the Magistrate at Kelang on December 16, 1976 and at the close of the preliminary inquiry on January 28, 1977 she was committed to stand trial at the High Court on the same charge.

When the trial commenced before me however on September 19, 1977, the learned Deputy Public Prosecutor amended the charge in two respects:

(i) The offence was alleged to have been committed at TBG 1306A, Jalan Harper, Kelang.

(ii) The offence alleged was that of doing an act preparatory to trafficking under section 39B(1)(c) of the Dangerous Drugs Ordinance.

The question is whether the court has jurisdiction to proceed with the trial on the amended charge without a fresh consent by the Public Prosecutor. As the matter is *res integra* I proceeded with the trial to save the public expense, the witnesses and jury being present in court. It will be observed that although the original and amended charges are two distinct offences, they are both created by the same section of the law viz. section 39B(1) and both carry the same penalty. Both require the consent of the Public Prosecutor under section 39B(3). The learned Deputy Public Prosecutor argued that the amendment was technical and as the Public Prosecutor had given his consent on the original charge he was at liberty to amend the charges in the manner he did. I do not think so. It was held in *Abdul Hamid* v. *Public Prosecutor*[1] that a consent to prosecute "is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". The Public Prosecutor has clearly exercised his mind in respect of the original charge when he gave his consent to prosecute some four months after the alleged offence. It was incumbent on him however to exercise the same degree of deliberation in respect of the amended charge. He has not done so. In *Lim Seo* v. *Regina*[2] counsel was given sanction to prosecute under section 379 of the Penal Code but he proceeded under section 381 of the Penal Code instead. It was held that counsel cannot depart from the specific authorisation of the Public Prosecutor. It seems to me that the same principles apply here. The facts of the case were fully before the Public Prosecutor at the time of giving his consent and he could have elected to proceed on the amended charge then. He did not do so. It would appear therefore that the Public Prosecutor has not given his consent to prosecute under the amended charge. That being so, the trial is a nullity on the authority of *Lyn Hong Yap* v. *Public Prosecutor*.[3]

Be that as it may, the facts as I found them did not support either charge. In the first place there is the confusion about the address. It is clear from the evidence that the police party raided house no. TBG 1306. The confusion began when they found a water bill at TBG 1306 in the name of the accused but the address given was TBG 1306A. There is no evidence that house number TBG 1306 and TBG 1306A are in fact the same house nor is there evidence to show that there is no house numbered TBG 1306A. A reasonable inference is that these numbers indicate two separate houses and if that be so a doubt arises if the accused had the care and management or was the occupier of the premises TBG 1306 Jalan Harper. This fact is important since the prosecution was relying on the presumptions under section 37(b) and (g) of the Dangerous Drugs Ordinance. I found on the evidence that these two presumptions did not apply.

Secondly, the drugs were found in tins under the kitchen. These tins were found amongst other tins which were empty. There was no evidence to connect the accused with these tins and as I had found

that the presumption of 'occupier' did not apply to the accused, the presumption of knowledge of the concealment of the drugs under section 37(g) did not arise either.

Thirdly, the quantities of drugs found were insufficient to raise the presumption of trafficking under section 37(da):

Drug	*Found in premises*	*Minimum Quantity under section 37(da)*
Morphine	86.3 grammes	100 grammes
Chandu	550.8 grammes	1000 grammes
Chandu dross	121.6 grammes	1000 grammes

It was this fact that led to the amendment of the alleged offence. I pause here to observe that there is no change in the quantities found by the police and at the trial. This fact was known to the prosecution throughout and certainly to the Public Prosecutor when he signed the consent on November 25, 1976. The evidence did not disclose any fact of trafficking as defined in section 2 other than that of concealment. As the evidence stood it was insufficient to support a charge under section 39B(1)(a).

Turning now to the amended charge. Packing drugs in small packets is preparatory to trafficking within the meaning of section 39B(1)(c) but there was no evidence that the accused packed these drugs or that she had anything to do with them.

The drugs were certainly concealed under the kitchen at TBG 1306 Jalan Harper. Who concealed the drugs there? I found as a fact that the accused did not.

Solicitors: *Radzi bin Tan Sri Sheikh Ahmad.*

SOUTH EAST ASIA BRICKWORKS SDN. BHD. v. MARIA ANTONETTE

[A.C.J. (Abdul Hamid J.) June 14, 1974]
[Kuala Lumpur — Civil Appeal No. 2 of 1974]

Contract — Building contract — Agreement for sale of house — Refusal of purchaser to accept key on ground that "municipal authorities had not yet granted certificate of fitness for occupation" — Whether reasonable.

Housing Developers — House ready for occupation — No certificate of fitness — Whether purchaser's refusal to accept key reasonable.

The appellants were housing developers. By a standard form of agreement they sold one of the houses to the respondent. When the house was ready for occupation the respondent refused to accept the keys on the ground that the municipal authorities had not yet granted the appellants a certificate of fitness for occupation. She then sued the appellants in the Magistrate's Court for damages for delay and succeeded. The appellants appealed.

Held: the respondent's contention that the house must not only be completed in the sense that it was fit for human habitation but must also be equipped with a certificate of fitness for occupation was unreasonable. The court would refuse to import a further term into the agreement.

The following authorities were cited in argument: *Key & Elphinstone:* Conveyancing Precedents 9th Edn. Vol. I; *Halsbury's* Laws of England, 3rd Edn., Vol. 8, *Lewis* v. *Hoare* 44 L.T. 66; *Miller* v. *Cannon Hill Estates* [1931] 2 K.B. 113; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.* [1935] A.C. 524; *Herne Bay Steam Boat Co.* v. *Hutton* [1903] 2 K.B. 683.

CIVIL APPEAL.

Lim Kean Chye and *Tan Bu Kian* for the appellants.

Respondent in person.

Abdul Hamid J. (delivering oral judgment): The dispute in this case arises on account of the construction placed by the parties in regard to the term "completion" used in Clause 2 of the agreement. Clause 2 reads as follows: —

"The purchaser shall pay to the company the balance of the said purchase price of $14,500 on completion of the house to be notified by the company."

The respondents' contention is that not only must the house be completed in the sense that it is fit for human habitation but must also be equipped with a certificate of fitness for occupation.

Primarily the court is to determine the meaning that may reasonably be assigned to the word used. In doing so the court should construe it within the four corners of the agreement.

In the light of the various stipulations contained in the agreement I am of the view that it is unreasonable to construe the word in the manner urged upon me by the respondent. This would amount to importing a further term namely, completion on satisfaction endorsed by the City Architect issuing a certificate of fitness for occupation. To do so would in effect, be importing a term which was not within the contemplation of the parties and would have the effect of frustrating the contract.

For this reason I will allow the appeal with costs. The order of the Magistrate is hereby set aside.

Appeal allowed.

Solicitors: *Sothi & Ang.*

R & I SECURITIES SDN. v. GOLDEN CASTLE FINANCE CORPORATION (M) BHD.

[O.C.J. (Syed Othman J.) December 31, 1977]
[Johore Bahru — Originating Summons No. 171 of 1977]

Land Law — Charge —Land already charged — Refusal to give consent to second charge — Caveat lodged — Application to extend — Provision in first charge disallowing creation of further charges without consent of first chargee — National Land Code 1965, ss. 241, 323(1)(a) & 326(2).

The applicants sought for the extension of the caveat registered against a piece of land until the civil suit filed by them against the registered proprietors, *M. Bhd.* had been finally disposed of, or until the payment of security by *M. Bhd.*, or until the respondents had obtained an order for sale. *M. Bhd.* had charged the title to the applicant on December 2, 1975 as a collateral security against *H. Ltd.* paying for shares valued at $1,999,570.25 which they had contracted to purchase. The respondents to whom title had already been charged, refused to give their consent to the second charge. As the second charge had not been registered the applicants entered a caveat.

The respondents deposed that *M.* charged the land to the respondents to secure repayment of a loan and under Clause 6 of the charge consent of the respondent must be obtained first before any further security or encumbrance could be executed over the land.